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10  
11 IN THE UNITED STATES DISTRICT COURT  
12 FOR THE NORTHERN DISTRICT OF CALIFORNIA  
13

14 **GILBERT CONTRERAS,**

Petitioner,

15  
16 v.

17 **BEN CURRY, Warden**

18 Respondent.

C07-03774 SBA

**REPLY TO OPPOSITION TO  
MOTION TO DISMISS**

Judge: The Honorable  
Saundra B.  
Armstrong

19  
20 **INTRODUCTION**

21 Respondent Curry moved to dismiss Petitioner Contreras's habeas corpus petition on the  
22 ground that he filed his petition beyond the one-year statute of limitations. In his opposition,  
23 Petitioner alleges that his petition was timely filed because: (1) the California Supreme Court's  
24 decision denying his habeas corpus petition was not final for 30 days; (2) his federal petition was  
25 filed earlier under the mail box rule; and (3) he is entitled to statutory tolling despite the  
26 unreasonable delay in filing his habeas petition in the state court of appeal.

27 For the reasons set forth below and in the moving papers, Petitioner's habeas petition  
28 should be dismissed as untimely.

**REPLY**

**PETITIONER'S HABEAS PETITION IS UNTIMELY.**

Petitioner alleges that his petition was timely filed because California Supreme Court's denial of his habeas petition, filed-endorsed April 11, 2007, was not final for 30 days. (Opp'n at 2.) Petitioner is incorrect, however, because under Rule 8.532(b)(2) of the California Rules of Court, a California Supreme Court's decision denying a writ petition within the Court's original jurisdiction, without the issuance of an alternative writ or an order to show cause, is final on filing.<sup>1/</sup> Because the California Supreme Court denied Petitioner's habeas petition without issuing an alternative writ or an order to show cause (Ex. 3 to Mot. to Dismiss), the court's decision was final on April 11, 2007. Thus, as of April 11, 2007, because Petitioner had waited almost exactly eleven months to file his superior court petition after exhausting his administrative remedies, he had one-month-one-day to file his federal petition assuming he is entitled to statutory tolling of the period of time his state habeas petitions were pending. 28 U.S.C. § 2244(d)(2).

Petitioner is not entitled to statutory tolling, however, because his state court petition was not properly pending when he delayed filing his petition to the state appellate court by eighty-eight days after the superior court's denial of his petition. (Exs. 1-2.) Thus, Petitioner is not entitled to statutory tolling of the eighty-eight days of unexplained and unreasonable delay from October 12, 2006 to January 19, 2007. *Carey v. Saffold*, 536 U.S. 214, 221 (2002) (a state petition is only "pending" if filed within a "reasonable time"); *Culver v. Director of Corrections*, 450 F.Supp.2d 1135, 1140 (C.D. Cal. 2006), citing *Saffold* at 853-54 (71-day and 97-day delays unreasonable because clearly longer than the 30 to 60 days most states provide for filing an appeal to the state supreme court, and "far longer than the 10-day period California gives a losing party to file a notice of appeal in the California Supreme Court"). Thus, even applying the mailbox rule, and thus using the May 8, 2007 date as the date his federal habeas petition is

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1. The California Supreme Court has original jurisdiction in habeas corpus proceedings. Cal. Const. art. VI, § 10.

1 deemed to be filed, Petitioner nonetheless filed his habeas petition more than two months past  
2 the one-year statute of limitations as demonstrated below:

- 3 • Disciplinary Hearing December 7, 2004 (found guilty)
- 4 • Director's Level Inmate Appeal Decision May 25, 2005
- 5 **(Petitioner files superior court petition eleven months after**  
6 **exhausting his administrative remedies)**
- 6 • Monterey Superior Pet. Filed 4/25/06 Denied 10/23/06

7 **October 23, 2006 to January 19, 2007 period not tolled**

- 8 • Cal. Ct. of Appeal Pet. Filed 1/19/07 Denied 2/20/07
- 9 • Cal. Supreme Court Pet. Filed 3/12/07 Denied 4/11/07
- 10 • U.S. Dist. Ct. (07-3774) Pet. Filed 5/8/07 (using mail box rule)

11 **CONCLUSION**

12 Because Petitioner's habeas petition is untimely, respondent requests a dismissal of the  
13 petition.

14 Dated: December 11, 2007

15 Respectfully submitted,

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**DECLARATION OF SERVICE BY U.S. MAIL**

Case Name: **Contreras v. Curry**

Case No.: **C07-03774 SBA**

I declare:

I am employed in the Office of the Attorney General, which is the office of a member of the California State Bar, at which member's direction this service is made. I am 18 years of age or older and not a party to this matter. I am familiar with the business practice at the Office of the Attorney General for collection and processing of correspondence for mailing with the United States Postal Service. In accordance with that practice, correspondence placed in the internal mail collection system at the Office of the Attorney General is deposited with the United States Postal Service that same day in the ordinary course of business.

On December 11, 2007, I served the attached

**REPLY TO OPPOSITION TO MOTION TO DISMISS**

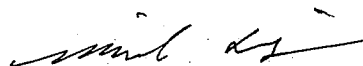
by placing a true copy thereof enclosed in a sealed envelope with postage thereon fully prepaid, in the internal mail collection system at the Office of the Attorney General at 455 Golden Gate Avenue, Suite 11000, San Francisco, CA 94102-7004, addressed as follows:

Gilbert Contreras  
E-59058  
Correctional Training Facility  
P.O. Box 689  
Soledad, CA 93960-0689  
in pro per

I declare under penalty of perjury under the laws of the State of California the foregoing is true and correct and that this declaration was executed on **December 11, 2007**, at San Francisco, California.

M. Xiang

Declarant



Signature